Supreme Court, U.S.
FILED

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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1997

GERALD GEE,

Petitioner,

v.

STATE OF FLORIDA AND BOARD OF REGENTS
OF THE STATE OF FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari To
The First District Court Of Appeals
For The State of Florida

GERALD GEE'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In determining the preclusive effect of a judgment in a federal action pursuant to federal common law, should *res judicata*, or claim preclusion, be applied to a claim that could not have been brought in the federal action because of Eleventh Amendment immunity?

2. In determining the preclusive effect of a judgment in a federal action pursuant to federal common law, should collateral estoppel, or issue preclusion, be applied to an issue that was not resolved in the federal action?

PARTIES TO THE PROCEEDING

The parties to the litigation are:

Plaintiff (Petitioner):

Gerald Gee

Defendants (Respondents):

State of Florida
Board of Regents of the State of Florida

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OPINIONS BELOW

The per curiam affirmance of the First District Court of Appeals for the State of Florida is reprinted in Appendix A. The order denying petitioner's motion for rehearing, rehearing *en banc*, or certification, dated June 5, 1998, is reprinted in Appendix C.

The June 26, 1997 order granting dismissal with prejudice by the Circuit Court of the Second Judicial Circuit in and for Leon County is reprinted in Appendix B.

JURISDICTION

The judgment of the First District Court of Appeals was rendered on April 20, 1998. A timely motion for reconsideration, reconsideration *en banc*, or certification was denied on June 5, 1998. The Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT LAWS

The Eleventh Amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State

STATEMENT OF THE CASE

The underlying facts of this case are set forth in the petition of Gerald Gee to this Court in Supreme Court Case No. 98-44. Petitioner refers to them and incorpo-

rates them by reference. Only the additional facts necessary to determine this matter are set forth here.

After commencing his action in federal court (the "federal action") in January 1995, Gee commenced administrative proceedings under both Title VII and the Florida Civil Rights Act (the "FCRA"), Fla. Stat. §§ 760.01 - 760.11. On April 2, 1996 -- well over one year after the federal action was commenced, and just before discovery was to have been completed in that action -- Gee received a notice of right to sue letter. On July 1, 1996, Gee commenced an action in Florida state court, in the Circuit Court of the Second Judicial Circuit in and for Leon County.

The state court complaint alleged race discrimination in employment by Florida A&M University ("FAMU") in violation of Title VII (42 U.S.C. §§ 2000e, *et seq.*) and the FCRA, both in suspending and punishing plaintiff for his speech (as alleged in the federal action) and in denying plaintiff tenure.

Shortly after the commencement of this action, defendants removed the case to federal court. Gee moved to remand. In an opinion and order dated September 30, 1996, Judge William Stafford of the U.S. District Court for the Northern District of Florida granted that motion. App. D. Judge Stafford recognized that the Eleventh Amendment precluded Gee's state law claim from being heard in federal court. App. D1-D2. The remainder of his opinion discussed the split in the law between those cases holding that the federal removal statute required remand of the entire action when one of the claims was barred by the Eleventh Amendment, and those cases holding that a partial remand of only the barred claim was

possible.[1] Judge Stafford concluded that the first line of cases was correct, and remanded the entire action back to state court "for lack of subject matter jurisdiction." App. D5.

Gee's federal action, which included a claim for a violation of Gee's Equal Protection right to be free of state-sponsored race discrimination as well as for violations of Gee's First Amendment and Due Process rights, had been brought against various individuals in their official and individual capacities through 42 U.S.C. § 1983. (The race discrimination claim also asserted a violation of 42 U.S.C. § 1981.) As described in the Petition in *Gee v. Humphries*, Sup. Ct. No. 98-44, those individuals moved for summary judgment on various grounds (including qualified immunity for the damages claims). The Court granted those motions with respect to Gee's First Amendment and Due Process claims. However, it denied the motions with respect to Gee's Equal Protection claim alleging race discrimination, concluding that there were issues of fact concerning defendants' motive remaining. *See* Petition in *Gee v. Humphries*, Sup. Ct. No. 98-44, App. B9-B10.

Because Gee wanted to immediately appeal the order granting summary judgment against him on First Amendment and Due Process grounds, and because the individual defendants had asserted, and had indicated that they would continue to assert, the defense of qualified immunity in the federal action (a defense unavailable to the state defendants in the state court action), Gee immediately dismissed his Equal Protection claim with prejudice.

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[1] This Court resolved that split in *Wisconsin Department of Corrections v. Schact*, 118 S. Ct. 2047 (1998).

Gee's decision to voluntarily dismiss also relied upon Judge Stafford's ruling that the federal courts lacked subject matter jurisdiction over his state court claims, thus precluding the doctrine of *res judicata* from applying to those legal theories (even if it did apply to the claims voluntarily dismissed with prejudice). After the final judgment was entered, Gee appealed the First Amendment and Due Process claims to the Eleventh Circuit.

After dismissal of the federal court action, defendants in the state court case moved to dismiss Gee's state court claims on the grounds of *res judicata* and collateral estoppel. Gee opposed that motion, and specifically pointed out that the preclusive effect of a federal judgment was a matter of federal law. *See* n.2, *infra*. In an order dated June 26, 1997, the Circuit Court of the Second Judicial Circuit for Leon County granted that motion. App. B. The Court's order based dismissal upon "the doctrines of *res judicata* and collateral estoppel."

Gee timely appealed that order to the First District Court of Appeals for the State of Florida, and once again asserted that federal law governed the issue. *See* n.2, *infra*. In an order dated April 20, 1998, that Court affirmed the lower court's order, without opinion. App. A. Gee timely moved for rehearing; that motion was denied in an order dated June 5, 1998. App. C.

Because the First District Court of Appeals did not write an opinion, the Florida Supreme Court lacks the jurisdiction to review its judgment. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). *See also Palmore v. Sidoti*, 466 U.S. 429, 431 (1984). Accordingly, the First District Court of Appeals is "the highest court of a State in which a decision could be had" in this matter.

28 U.S.C. § 1257.

REASONS FOR GRANTING THE WRIT

The preclusive scope of a federal judgment in a federal question case is a matter of federal common law. *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994).[2] Either basis (collateral estoppel or *res judicata*) for the judgments of the Courts below creates an interpretation of federal common law wholly out-of-step with fundamental principles of preclusion, as well as circuit courts of appeals and other state courts of last resort.

A. This Court Should Grant The Petition To Resolve Whether Principles Of *Res Judicata* Applicable To Federal Judgments Preclude Claims That Could Not Have Been Brought In The Federal Action Because Of A Jurisdictional Bar

As a general rule, of course, principles of *res judicata*, or claim preclusion, bar not only claims that were brought in the first action, but also claims that could have been brought, but were not, arising out of the same general factual pattern as the claims brought. Restatement (Second) of Judgments § 24 (1982).

But the general rule has exceptions. The Restatement recognizes a series of exceptions to the general rule

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[2] Gee's briefs in the Courts below noted that federal law was applicable. *E.g.*, Initial Brief of Appellant to First District Court of Appeals, p. 6, n.4; Plaintiff's Memorandum In Opposition To Defendants' Summary Judgment Motion, p. 6, n.5. Defendants did not dispute this point.

of Section 24 in Section 26. The relevant exception here is set forth in Section 26(1)(c), which provides that "the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant" where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts . . . "

The Restatement explains this exception as follows:

> The general rule of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

Restatement (Second) Judgments § 26, Comment c (1982). *See also Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) (reversing judgment dismissing Sherman Act claim because of prior state court lawsuit; "claim preclusion generally does not apply where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter of the courts'" *quoting* Restatement (Second) of Judgments, § 26(1)(c) (1982)).

No one disputes that the Eleventh Amendment precluded Gee from bringing his claim under the FCRA in federal court. Indeed, Judge Stafford held that the entire state court action could not be brought in federal court.[3] Thus, assuming *arguendo* that the individual defendants in Gee's federal action are the "same" as the state defendants in his state court action, and the facts underlying each suit were precisely the same, the Restatement would not preclude Gee's state court theories because those theories could not have been brought in the first action (*i.e.*, the federal action).

In applying federal common law, virtually all courts that have considered the matter have followed the Restatement on this point. The following federal circuit court cases are on point. *E.g.*, *Bio-Technology General Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1563 (Fed. Cir. 1996) (adjudication before International Trade Commission concerning patent infringement or validity cannot claim preclusive effect in federal district court, since ITC's jurisdiction is limited) (citing Restatement); *Computer Associates International v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997) (loss of Copyright Act suit in federal court did not bar suit under French copyright law in France, where one of the defendants was beyond the reach of the U.S. courts; "[e]ven where a second action arises from some of the same factual circumstances that gave rise to a prior action, *res judicata* is inapplicable if formal jurisdic-

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[3] It is true that, under this Court's later decision in *Wisconsin Dep't of Corrections v. Schacht*, Judge Stafford could have retained jurisdiction over the Title VII claim only. But a dismissal based upon an erroneous jurisdictional barrier is treated by the Restatement precisely as a real jurisdictional barrier. Restatement (Second) Judgments § 26, Comment d (1982).

tional or statutory barriers precluded the plaintiff from asserting its claims in the first action"); *Martin v. Garman Const. Co.*, 945 F.2d 1000, 1003 (7th Cir. 1991) (NLRB ruling that employer did not commit unfair labor practice did not bar union's ERISA suit, since NLRB lacked jurisdiction over ERISA claims) (citing Restatement), *cert. denied*, 502 U.S. 1122 (1992); *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1056 (8th Cir. 1990) (refusing to apply claim preclusion to Indian claim of title because federal Indian Claims Commission lacked jurisdiction over that claim); *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989) ("It is black letter law that a claim is not barred by res judicata if it could not have been brought. If the court rendering judgment lacked subject matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded."), *citing Nilsen v. City of Moss Point*, 674 F.2d 385 (5th Cir. 1982); *Kale v. Combined Insurance Co. of America*, 924 F.2d 1161, 1167 (1st Cir. 1991) ("the rule requiring all claims arising from a single cause of action to be asserted in a single lawsuit will not apply if the plaintiff was unable to assert a particular claim or theory in the original case 'because of the limitations on the subject matter jurisdiction of the courts'" *quoting* Restatement (Second) of Judgments, § 26(1)(c)(1982)).

Other than the Courts below, state courts considering the preclusive effect of a federal judgment have arrived at the same conclusion. *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241, 243 (1977), *cert. denied*, 440 U.S. 936 (1979) (dismissal on merits of federal constitutional challenge did not bar subsequent state court suit alleging violations of state constitution; "if the federal court would have *refrained* from exercising its pendent jurisdiction over the state claims, then the subsequent suit

in state court would *not be barred* by res judicata" (emphasis in original)); *Terrebonne Fuel & Lube Co. v. Placid Refining Co.*, 666 So.2d 624, 634 (La. 1996) (federal bankruptcy court's refusal to exercise supplemental jurisdiction over state law claims, even though it had such jurisdiction, "negate[s] a finding of res judicata" in subsequent state court suit, since res judicata does not apply "when the federal court clearly would not have had jurisdiction to entertain the omitted state claim, '*or having jurisdiction, clearly would have declined to exercise it as a matter of discretion*'") (emphasis in original), *quoting Reeder v. Succession of Palmer*, 623 So. 2d 1268, 1273 (La. 1993); *Watkins v. Resorts International Hotel & Casino*, 124 N.J. 398, 591 A.2d 592, 599 (1991) ("If, on the other hand, a claim could not have been presented in the first action, then it will not be precluded in a later action" *citing* Restatement); *San Antonio School Dist. v. McKinney*, 936 S.W.2d 279, 281 (Tex. 1996) (under federal claim preclusion law, "res judicata will not apply if the federal court (1) lacked jurisdiction over the omitted state law claims, or (2) possessed jurisdiction over the omitted state law claims but would clearly have declined to exercise that jurisdiction as a matter of discretion"); *Hughes v. Trans World Airlines*, 336 A.2d 572, 578 (Del. 1975) (dismissal by Supreme Court of Sherman Act lawsuit did not bar subsequent state court lawsuit alleging breach of fiduciary duty since there was no evidence, only "speculation," that the courts would have been willing to exercise pendent jurisdiction over the state claims); *Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164, 1168 (1982) ("if the Federal court in the first action would clearly not have had jurisdiction to hear the State claim or if, having jurisdiction, clearly would have declined to exercise it as a matter of discretion, then a second action in a State court should not

be precluded"), *citing Pope v. City of Atlanta, supra*; *Silver v. Queen's Hospital*, 629 P.2d 1116, 1122-23 (Haw. 1981) ("where it is clear that a federal court would have refrained from exercising pendent jurisdiction over state claims, such as where a jurisdictional bar operates, or where the federal district has exercised its discretion not to hear them," then "those state claims [will] not be barred in a subsequent state court suit"), *citing Pope v. City of Atlanta, supra*.

Thus, the reliance of the Courts below on principles of *res judicata* demonstrates that the Florida courts have applied federal principles of preclusion differently than the vast majority of courts. This Court should grant the petition to resolve this conflict.

B. This Court Should Grant The Petition To Resolve Questions Concerning Whether Principles Of Collateral Estoppel Applicable To Federal Judgments Preclude Issues That Were Not Resolved In The Federal Action

The trial court dismissed Gee's action on both *res judicata* and collateral estoppel grounds. While relying on the former reflects the Florida courts' refusal to adopt a well-established exception to a general rule, relying on the latter reflects the Florida courts' decision to decline to adopt a general rule itself.

Unlike *res judicata*, collateral estoppel, or issue preclusion, only applies to claims that were actually resolved in the earlier action. The Restatement so states. Restatement (Second) of Judgments, § 27, comment e (1982) ("A judgment is not conclusive in a subsequent action as to issues which might have been but were not

litigated and determined in the prior action"). In developing the federal common law of issue preclusion, virtually every court (including this one) has adopted the "actually decided" standard. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) ("the doctrine of collateral estoppel . . . precludes relitigation of issues actually litigated and necessary to the outcome of the first action"); *Levy v. Kosher Overseers Ass'n of America*, 104 F.3d 38, 41 (2d Cir. 1997) ("In order to apply the doctrine of collateral estoppel to bar litigation of an issue . . . 'the issue in the prior proceeding must have been actually litigated and actually decided'"), *quoting Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986); *Hawksbill Sea Turtle v. F.E.M.A.*, 126 F.3d 461, 475 (3d Cir. 1997) (factors that must be present to apply the doctrine of collateral estoppel include "the issue [being] actually decided in a decision that was valid, final, and on the merits"); *Brown v. United States*, 508 F.2d 618, 621 (3d Cir. 1974) ("We agree . . . that the . . . issue presented in the instant case was also squarely presented to the court in [earlier case]. However, this fact alone does not make collateral estoppel operative since that doctrine only precludes 'the relitigation of issues actually decided in former judicial proceedings'"), *cert. denied*, 422 U.S. 1027 (1975); *Gilday v. Dubois*, 124 F.3d 277, 283 (1st Cir. 1997) (issue must have been "actually decided"); *Schendel v. Curtis*, 83 F.3d 1399, 1405 (Fed. Cir. 1996) (same); *Olchowik v. Sheet Metal Workers*, 875 F.2d 555, 557 (6th Cir. 1989) (same). *See generally* 18 Wright & Miller, *Federal Practice and Procedure*, § 4420 (1981) ("issue preclusion . . . [is] limited to matters that have actually

been decided").[4]

Gee's discrimination claim in the federal action was never resolved by the Court because he voluntarily dismissed it with prejudice. As the Restatement observes, issue preclusion does not apply to voluntary dismissals. *Schendel v. Curtis*, 83 F.3d at 1405 ("For issue preclusion to apply here . . . that issue must have been . . . actually decided. . .'In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated,' and thus issue preclusion does not apply" *quoting* Restatement (Second) of Judgments, § 27, comment e (1982)).

Again, this court, and many other courts, have reached the same conclusion, reasoning that consent judgments or voluntary dismissals do not result in issue preclusion because they contain no findings. *E.g.*, *Lawlor v. Screen Services Corp.*, 349 U.S. 322, 327 (1955) ("the judgment was unaccompanied by findings and hence did not bar the parties on any issue. . .which might arise in connection with another cause of action"); *Pelletier v. Zweifel*, 921 F.2d 1465, 1501 (11th Cir. 1991) ("Since such a judgment [a dismissal with prejudice] is unaccompanied by findings, it does not, however, collaterally estop the plaintiff from raising issues that might have been litigated if the case had proceeded to trial"), *cert. denied*, 502 U.S. 855 (1991), *citing Lawlor*. *Accord* 1B *Moore's Federal Practice*, ¶ 0.443[3] at III.-575 (1996) ("[J]udg-

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[4] This Court has recognized that the same limit applies to issue preclusion resulting from state court judgments. *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979) ("collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit"), *citing Montana v. U.S.*, 440 U.S. 147, 153 (1979).

ments upon stipulations[] should not be given conclusive effect under the doctrine of collateral estoppel").[5] Of course, Judge Hinkle's decision *denying* defendants' motion for summary judgment on Gee's Equal Protection claim in federal court has no collateral estoppel effect either. *Cf. Schiro v. Farley*, 510 U.S. 222, 232-33 (1994) (jury's failure to return verdict on "intentional murder" charge had no collateral estoppel effect because defendant could not demonstrate that there was an ultimate determination of fact in his favor).

CONCLUSION

For the reasons stated, this Court should grant the petition.

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[5] *See also E.E.O.C. v. Jacksonville Shipyards*, 696 F. Supp. 1438, 1442 (M.D. Fla. 1988) ("While 'the stipulation of dismissal with prejudice constitutes a final judgment for purposes of res judicata (claim preclusion) [,] [it does] not for the purpose of collateral estoppel (issue preclusion)'" *quoting Sullivan v. EASCO Corp.*, 662 F. Supp. 1396, 1408 (D. Md. 1987)); *St. Vincent's Hosp. and Medical Center of New York v. Division of Human Rights*, 553 F. Supp. 375, 379 (S.D.N.Y. 1982) (plaintiff's dismissal with prejudice of her federal suit did not collaterally estop pending state proceedings, since "voluntary dismissal does not reflect any determination by the Court of any fact or issue before it").

APPENDICES

APPENDICES

A Opinion Of The First District Court Of Appeals, State Of Florida Affirming The Judgment Of The Circuit Court (April 20, 1998) A1

B Order Of The Circuit Court Of The Second Judicial Circuit, In And For Leon County, State of Florida, Dismissing Action With Prejudice (June 26, 1997) B1

C Order Of The First District Court Of Appeals, State Of Florida, Denying Motion For Rehearing, Certification, Or Rehearing En Banc (June 5, 1998) C1

D Order Of United States District Court For The Northern District Of Florida Remanding Case To State Court (September 20, 1996) D1

APPENDIX A

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

GERALD GEE,

Appellant,

v.

STATE OF FLORIDA, BOARD OF REGENTS,

Appellee.

CASE NO. 97-3061

_____/

Opinion filed April 20, 1998.

An appeal from the Circuit Court for Leon County. William L. Gary, Judge.

Marie A. Mattox, Mattox & Hood, P.A., Tallahassee, for Appellant.

David K. Miller, of Broad & Cassel, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

MICKLE and DAVIS, JJ., MCDONALD, PARKER LEE, SENIOR JUDGE, Concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

GERALD GEE,

Plaintiff,

vs. Civil Action No. 96-3741

STATE OF FLORIDA, BOARD OF REGENTS,

Defendant.

_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DISMISSAL WITH PREJUDICE

THIS CAUSE having come on to be heard before this Court on Monday, June 23, 1997, upon Defendant, State of Florida, Board or Regents' Motion for Summary Judgment in the above styled cause, and after having heard arguments of counsel, having reviewed Defendant's Motion for Summary Judgment, Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Plaintiff's Motion to Strike Motion for Summary Judgment and Supplemental Response, and Defendant's Reply to Motion to Strike and Supplemental Response, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Summary Judgment is GRANTED, based on the doctrine of *res judicata* and collateral estoppel.

2. Plaintiff's Motion to Strike is DENIED.

3. Plaintiff's claims are thereby dismissed with prejudice. Plaintiff shall take nothing by this suit and shall go hence without day.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 26th day of June, 1997.

/s/_____
William L. Gary
Circuit Court Judge

APPENDIX C

C1

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (850) 488-6151

June 5, 1998

CASE NO: 97-03061

L.T. CASE NO. 96-3741

Gerald Gee v. State of Florida, Board of Regents

Appellant (s), Appellee(s).

BY ORDER OF THE COURT:

Appellant's motions for rehearing, for certification, and for rehearing en banc, filed May 4, 1998, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/_____

Jon S. Wheeler, Clerk

Seal

By: /s/_____
Deputy Clerk

Copies:

Marie A. Mattox
David Allen Roberts
M. Stephen Turner
David K. Miller

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GERALD GEE,

Plaintiff,

4:96cv329-WS

vs.

STATE OF FLORIDA,
BOARD OF REGENTS,

Defendant.

_____/

ORDER REMANDING CASE TO STATE COURT

Plaintiff, Gerald Gee ("Gee"), initially filed this case in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, against his former employer, a state agency. The agency, Florida Board of Regents ("BOR"), removed the case to this court under Title 28, United States Code, Section 1441, subsections (a) and (b) of which authorize removal of cases founded on a claim or right arising under federal law.

Before the court at this time is Gee's motion to remand his case to state court (doc. 6). Gee suggests that the case must be remanded because his complaint includes not only a federal claim but also a state law claim that, under the Eleventh Amendment, is not justiciable in federal court. See Pennhurst State Sch. & Hosp. v.

Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984) (holding that a claim in federal court against a state agency under state law is barred by the Eleventh Amendment even when the claim is brought into federal court under pendent or supplemental jurisdiction).

DISCUSSION

Together, subsection (a) and (b) of the federal removal statute permit removal of "[a]ny civil action of which the district courts of the United States have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. S 1441 (b).[1] Some courts have construed these subsections to mean that remand of an entire action is required if any part of the action is barred by the Eleventh Amendment. See, e.g., Gorka v. Sullivan, 82 F.3d 772 (7th Cir. 1996); Frances J. v. Wright, 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204, 130 L.Ed.2d 134 (1994); McKay v. Boyd Constr. Co., 769 F.2d 1084 (5th Cir. 1985); Miles v. Kilgore, 928 F. Supp. 1071 (N.D. Ala. 1996) (adopting the reasoning of Gorka and Frances J.); Ta v. Neimes, F. Supp. 977 (W.D. Tex. 1996); Cotton v. South Dakota, 843 F. Supp. 564 (D.S.D 1994). Other courts have determined that sections 1441(a) and 1441(b) permit them to remand those claims and/or defendants protected by the Eleventh Amendment but to retain jurisdiction over claims otherwise justiciable in

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[1] Section 1441 (a) provides that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

federal court. See, e.g., Kruse v. Hawaii, 68 F.3d 331 (9th Cir. 1995); Henry v. Metro. Sewer Dist., 922 F.2d 332 (6th Cir. 1990); Texas Hosp. Ass'n v. Nat'l Heritage Ins. Co., 802 F. Supp. 1507 (W.D. Tex. 1992).

The meaning of the phrase "civil action" lies at the heart of the courts' disagreement about remand in cases removed under sections 1441(a) and 1441(b). In the complete-remand line of cases, courts have reasoned that the phrase "civil action" denotes the entirety of the proceedings in question, not merely bits and pieces of those proceedings. Cotton, 843 F. Supp. at 567; See also Arango v. Guzman Travel Advisors Corp., 621 F.2d. 1371, 1376 (5th Cir. 1980) (interpreting the phrase "civil action" as used in section 1441 to mean "the entirety of the proceedings in question, not merely those aspects involving discrete federal claims or parties"). Under this reasoning, removal of a case that includes a claim or claims barred by the Eleventh Amendment is improper in the first instance because the court does not have original jurisdiction over the entire "civil action."

Exemplifying the partial-remand cases, the court in Texas Hospital Association, 802 F. Supp. at 1507, gave three reasons for rejecting the analysis of the complete-remand line of cases. First, the district court observed that when a case is filed initially in federal court, the court may dismiss just those claims or defendants protected by the Eleventh Amendment without losing jurisdiction over the entire action. It would be "anomalous," the court surmised, "to reach a different result merely because the case was initially filed in state court." 802 F. Supp. at 1515. Second, the court said:

[W]hile it is true that Section 1441 "does

> not countenance the removal of bits and pieces of cases," Simmons, 740 F. Supp. at 786-87 (emphasis added), it does not generally preclude federal courts from remanding bits and pieces of cases if a court finds that some, but not all, claims belong in state court or there are other reasons to separate the state and federal claims.

Texas Hosp. Ass'n, 802 F. Supp. at 1515 (emphasis in original). Finally the Texas court noted the Supreme Court's purported preference for federal court vindication of federal rights. Influenced by each of these three factors, the court in Texas Hospital Association refused to find that it lacked jurisdiction over claims that were not barred by the Eleventh Amendment merely because such claims were joined with claims that were barred by the Eleventh Amendment. Apparently satisfied that removal in the first instance was proper, the Texas district court concluded that partial, rather than full, remand was appropriate.

This court finds more persuasive the analysis set out in the Frances J. line of cases, where courts correctly recognized that removal is a statutory right that is to be strictly construed, see Cotton, 843 F. Supp. at 568 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-109, 91 S. Ct. 868, 85 L.Ed. 1214 (1941)); where courts properly focused on the propriety of removal before they turned to the question of whether remand should be full or partial given Eleventh Amendment concerns, see Frances J., 19 F.3d at 341 (finding the issue to be the scope of a federal court's removal jurisdiction under section 1441(a) and not the jurisdictional scope of the Eleventh Amendment); and where courts did not concern themselves

with what they would have done if the matter had been filed originally in federal court and what they could have done assuming removal itself was proper.

Consistent with the reasoning of the courts in Frances J. and its progeny, this court finds that removal of this case was not authorized under sections 1441(a) & 1441(b). Without such authorization, the court must remand the entire case for lack of subject matter jurisdiction.

Accordingly, it is ORDERED:

1. Plaintiff's motion for remand (doc. 6) is GRANTED.

2. This action shall be remanded to the Circuit Court, Second Judicial Circuit of the State of Florida in and for Leon County. The clerk shall send a certified copy of this order of remand to the Clerk of the Circuit Court in and for Leon County.

DONE AND ORDERED this 30th day of September, 1996.

/s/_____
William Stafford
Senior United States District Judge